

**REMARKS**

Applicants have thoroughly considered the Examiner's remarks in the March 26, 2009 Office action. Applicants have amended Claims 1 and 17 in this Amendment E. Claims 2, 4, 5, 18, 20, and 21 have been canceled. Claims 1, 3, 6-17, 19-32 and 34-42 are pending.

**I. Rejection of Claims 32 and 34-41 Under 35 U.S.C. § 101**

Claims 32 and 34-41 stand rejected under 35 U.S.C. 101 as being **directed** to non-statutory subject matter. In particular, the Examiner alleges that a "computer readable medium" as recited in claims 32 and 34-41 is not defined in the specification as being hardware or software. Thus, the Examiner alleges that a "computer readable medium" can be interpreted as solely software. Further, the Examiner alleges that MPEP § 2106.01 indicates that a computer readable medium is software if a definition in Applicants' specification does not specifically state that a computer readable medium is hardware. Applicants respectfully disagree.

In contrast to the Examiner's allegation, MPEP §2106.01 clearly states "a claimed computer-readable medium encoded with a computer program is a computer element which defines structural and functional interrelationships between the computer program and the rest of the computer which permit the computer program's functionality to be realized, and is thus statutory. See *Lowry*, 32 F.3d at 1583-84, 32 USPQ2d at 1035." (emphasis added).

Further, when a term is not defined in the specification, the courts have held that one "must look at the ordinary meaning

of the words in the context of the written description and the prosecution history." See *Phillips v. AWH Corporation*, 415 F.3d. 1303, 1312 (Fed. Cir. 2005) (en banc). In addition, the courts have held that "because dictionaries, and especially technical dictionaries, endeavor to collect the accepted meanings of terms used in various fields, of science and technology, those resources have been recognized as among the many tools that can assist the court in determining the meaning of particular terminology to that of skill in the art of the invention." See *Atofina v. Great Lakes Chem Corp.*, 441 F. 3d991 (Fed. Cir. 2006).

Applicants respectfully submit that Merriam-Webster recites a definition of the term "medium" as "something (as a magnetic disk) on which information may be stored." See "medium." Merriam-Webster Online Dictionary. 2009. In addition, claims directed toward a "computer readable medium" are well known in the art to be an article of manufacture, and in particular a storage device such as a floppy disk or a compact disk. The Federal Circuit ruled in *In re Beauregard*; 53 F.3d 1583 (Fed. Cir. 1995) that a computer readable medium is considered patentable subject matter as it is an article of manufacture, e.g., a floppy disk.

For at least these reasons, Applicants submit that claims 32 and 34-41 satisfy the requirements of 35 U.S.C. 101. As such, reconsideration and withdrawal of the rejection under 35 U.S.C. 101 are respectfully requested.

## **II. Rejection of Claims 1, 3-17, 19-32, and 34-41 Under 35 U.S.C. 103(a)**

The rejection of Claims 1, 3-17, 19-32 and 34-41 under 35 U.S.C. § 103(a) as being unpatentable over U.S. Patent No.

6,272,110 to Tunncliffe et al. (hereinafter referred to as "Tunncliffe") in view of US patent No. 6,209,033 to Datta et al. (hereinafter referred to as "Datta") is respectfully traversed.

No combination of Tunncliffe and Datta describes or suggests a method of maintaining capacity of a network including "defining future times at which a capacity of the network is evaluated; determining a total capacity of the network (TNC) at each of the future times," and "determining at each of the future times a lead time for adding product for applying the determined change in network capacity (DCNC) to the network, wherein the lead time indicates an amount of time needed for delivery and installation of purchased DCNC; and in advance of each future time based on the lead time determined with respect to each particular future time, initiating efforts to obtain product for applying the determined change in network capacity (DCNC)" as recited in amended Claim 1.

The Examiner alleges that Tunncliffe describes that a lead time is a function of an installation time for installing a product and an advance purchase time for obtaining the product at column 3, lines 22-55 of Tunncliffe. Applicants respectfully disagree.

Nowhere at column 3, lines 22-55, or anywhere else in Tunncliffe, does it describe or suggest that a lead time is a function of an installation time for installing a product and an advance purchase time for obtaining the product. At best, Tunncliffe describes that by using results of a predictor, information about when excess will occur, an amount of excess and period of time during which the excess will occur may be provided. This information can be made available to the customer and also to the network operator/service provider who are then able to take action based on this information. However, predicting when excesses will occur and "taking action based on

this information" does not describe determining at each future times a lead time for adding product for applying a determined change in network capacity (DCNC) to a network, wherein the lead time indicates an amount of time needed for delivery and installation of purchased DCNC, and in advance of each future time based on the lead time determined with respect to each particular future time, initiating efforts to obtain product for applying the determined change in network capacity (DCNC).

Further, Datta describes evaluating a present and future capacity of individual links that make up a network by evaluating one of an upper bound or a lower bound capacity of each of the links that are either defined by a system administrator or predetermined. Thus Datta does not remedy the deficiencies of Tunnicliffe in describing or rendering obvious the features of determining at each future times a lead time for adding product for applying a determined change in network capacity (DCNC) to a network, wherein the lead time indicates an amount of time needed for delivery and installation of purchased DCNC, and in advance of each future time based on the lead time determined with respect to each particular future time, initiating efforts to obtain product for applying the determined change in network capacity (DCNC).

For at least these reasons, Applicants submit that independent Claim 1 is patentable over the cited art. To the extent that independent Claims 17 and 32 recite limitations similar to the limitations recited in Claim 1, independent Claims 17 and 32 are believed to be patentable for at least the same reasons that Claim 1 is believed to be patentable.

Claims 2, 4 and 5 have been canceled. Claims 3 and 6-16 depend from and further limit Claim 1, and are patentable for at least the same reasons that Claim 1 is patentable. Thus,

Applicants request that the rejection of Claims 3 and-16 be removed.

Claims 18, 20, and 21 have been canceled. Claims 19 and 22-31 depend from and further limit Claim 17, and are patentable for at least the same reasons that Claim 17 is patentable. Thus, Applicants request that the rejection of Claims 19 and 22-31 be removed.

Claims 34-41 depend from and further limit claim 32, and are patentable for at least the same reasons that claim 32 is patentable. Applicants request that the rejection of claims 34-41 be removed.

For at least these reasons set forth above, Applicants respectfully request that the rejection of Claims 1, 3, 6-17, 19, and 22-31 under 35 U.S.C. § 103(a) be removed.

### **III. Rejection of Claim 42 Under 35 U.S.C. 103(a)**

The rejection of Claim 42 under 35 U.S.C. 103(a) as being unpatentable over Tunnicliffe and Datta, in view of U.S. Publication No. 2004/0202160 to Westphal is respectfully traversed. However, Claim 42 depends from and further limits Claim 1, and is patentable for at least the same reasons that Claim 1 is patentable. Thus, Applicants respectfully request that the rejection under 35 U.S.C. § 103(a) of Claim 42 be removed.

### **Conclusion**

Applicants submit that the claims are allowable for at least the reasons set forth herein. Applicants thus respectfully submit that Claims 1, 3, 6-17, 19-32 and 34-42 as presented are in condition for allowance and respectfully request favorable reconsideration of this application.

Although the prior art made of record and not relied upon may be considered pertinent to the disclosure, none of these references anticipates or makes obvious the recited aspects of the invention. The fact that Applicants may not have specifically traversed any particular assertion by the Office should not be construed as indicating Applicants' agreement therewith.

The Commissioner is authorized to charge Deposit Account No. 12-384 for any fees incurred during the pendency of this application.

Respectfully submitted,

/Kevin K. Jones/

Kevin K. Jones, Reg. No. 56,809  
ARMSTRONG TEASDALE LLP  
One Metropolitan Square, 26th Floor  
St. Louis, Missouri 63102  
(314) 621-5070

KKJ\JJB\tmg  
VIA EFS